



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 147**

**[EPA-HQ-OW-2015-0372; FRL 9957-48-OW]**

## **State of Kentucky Underground Injection Control (UIC) Class II Program; Primacy Approval**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking this action to approve the Commonwealth of Kentucky's Underground Injection Control (UIC) Class II Program for primacy. EPA determined that the state's program represents an effective program to prevent underground injection activities that endanger underground sources of drinking water (USDWs), as required under section 1425 of the Safe Drinking Water Act (SDWA). EPA's approval allows the state to implement and enforce state regulations for UIC Class II injection wells located within the state. The Commonwealth's authority excludes the regulation of injection well Classes I, III, IV, V and VI and all wells on Indian lands, as required by rule under the SDWA.

**DATES:** This rule is effective on **[Insert date 30 days after date of publication in the Federal Register]**. For judicial purposes, this final rule is promulgated as of **[Insert date 30 days after date of publication in the Federal Register]**. The incorporation by reference of certain

publications listed in the rule is approved by the Director of the Federal Register as of **[Insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2015-0372, to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Holly S. Green, Drinking Water Protection Division, Office of Ground Water and Drinking Water (4606M), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 566-0651; fax number: (202) 564-3754; email address: [green.holly@epa.gov](mailto:green.holly@epa.gov); or Nancy H. Marsh, Safe Drinking Water Branch, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303; telephone number (404) 562-9450; fax number: (404) 562-9439; email address: [marsh.nancy@epa.gov](mailto:marsh.nancy@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Why is EPA Issuing this Final Rule?**

On October 28, 2016, EPA published Kentucky's Class II primacy approval via a direct final rule with a parallel proposal. The EPA stated in the direct final rule that if we received

adverse comment, the direct final rule would not take effect and we would publish a timely withdrawal in the Federal Register. During the 30-day comment period, which ended on November 28, 2016, the EPA received three adverse comment letters questioning Kentucky's capacity to run the Class II program, along with some technical concerns regarding the state's program. As a result, EPA withdrew the direct final rule in the Federal Register in a separate notice on **[Insert date of publication in the Federal Register and Federal Register citation]**. As stated in the direct final rule and the parallel proposed rule, EPA indicated that it will address the public comments in any subsequent final action, which will be based on the parallel proposed rule, and will not institute a second comment period on this action.

EPA has responded in detail to the public comments received and has placed the response to comment document in the docket for this action. A summary of the comments received and EPA response can be found in section V of this action.

## **II. Does This Action Apply to Me?**

### *Regulated Entities*

Category	Examples of Potentially Regulated Entities	North American Industry Classification System
Industry	Private owners and operators of Class II injection wells located within the state (Enhance Recovery, Produce Fluid Disposal and Hydrocarbon Storage)	211111 & 213111

This table is intended to be a guide for readers regarding entities likely to be regulated by

this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### **III. Legal Authorities**

The state applied to EPA for primacy (primary implementation and enforcement authority) under section 1425 of the SDWA, 42 U.S.C. Sections 300h-4, for all Class II injection wells within the state except those on Indian lands. EPA approves the Commonwealth of Kentucky's UIC Program primacy application for these Class II injection wells by rule, as required under the SDWA, finding that it represents an “effective” program to prevent underground injection activities that endanger USDWs. Accordingly, EPA codifies the state’s program in the Code of Federal Regulations (CFR) at 40 CFR part 147, under the authority of the SDWA, sections 1425, 42 U.S.C. 300h-4.

EPA’s approval is based on a legal and technical review of the state’s primacy application as directed at 40 CFR part 145 and the requirements for state permitting and compliance evaluation programs, enforcement authority and information sharing to determine that the state’s program is effective. EPA oversees the state’s administration of the UIC program; part of the agency’s oversight responsibility requires quarterly reports of non-compliance and annual UIC performance reports pursuant to 40 CFR §144.8. The Memorandum of Agreement between EPA and the Commonwealth of Kentucky, signed by the Regional Administrator on October 20, 2015, provides EPA with the opportunity to review and comment on all permits.

Under section 1422 of the SDWA, EPA continues to administer the UIC program for Class I, III, IV, V and VI injection wells in the state and all wells on Indian lands (if any such lands exist in the state in the future).

#### **IV. Kentucky's Application**

##### *A. Public Participation Activities Conducted by the Commonwealth of Kentucky*

As part of the primacy application requirements, the state held a public hearing on the state's intent to apply for primacy. The hearing was held on September 23, 2014, in the city of Frankfort, Kentucky. Both oral and written comments received for the hearing were generally supportive of the state pursuing primacy for the UIC Class II injection well program.

##### *B. Public Participation Activities Conducted by EPA*

On November 10, 2015, EPA published a notice of the state's application in the Federal Register (80 FR 69629). This notice provided a comment period and that a public hearing would be held if requested. EPA received one comment during the comment period, and no requests for a public hearing. An anonymous commenter suggested the state agency give permission to construct these Class II wells so that energy dependency and job creation remain domestic and that extraction of oil and gas resources be done in an environmentally sound manner. EPA determined that the issue was outside the scope of the UIC program and not relevant as to whether the state's regulations are effective to manage the UIC Class II injection well program in accordance with section 1425 of the

Safe Drinking Water Act.

*C. Incorporation by Reference*

This final rule amends 40 CFR part 147 and incorporates by reference EPA-approved state statutes and regulations. The provisions of the Commonwealth of Kentucky Code that contain standards, requirements and procedures applicable to owners or operators of UIC Class II wells are incorporated by reference into 40 CFR part 147. Any provisions incorporated by reference, as well as all permit conditions or permit denials issued pursuant to such provisions, will be enforceable by EPA pursuant to the SDWA, section 1423 and 40 CFR 147.1(e).

In order to better serve the public, the agency is reformatting the codification of the EPA-approved state statutes and regulations. Instead of codifying the Commonwealth of Kentucky's Statutes and Regulations as separate paragraphs in the text of 40 CFR part 147, EPA is now codifying a binder that contains the "EPA-Approved Commonwealth of Kentucky Safe Drinking Water Act §1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II wells." This binder will be incorporated by reference into 40 CFR part 147 and available at [www.regulations.gov](http://www.regulations.gov) in the docket for this rule. The agency is also codifying a table listing the "EPA-Approved Commonwealth of Kentucky Safe Drinking Water Act §1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II wells" in 40 CFR part 147.

**V. Summary of Response to Comments**

*A. Resources*

Commenters believe that Kentucky does not have adequate resources to implement the Class II UIC Program. Kentucky is planning on filling two new positions once primacy is granted. Kentucky has 16 inspectors as compared to EPA's 2 full-time inspectors. EPA evaluated proposed resources and determined that they are adequate for an effective program to prevent endangerment to USDWs.

*B. Administrative Procedures for Processing Permits*

One commenter does not believe that Kentucky has the same regulatory requirements as the EPA for providing public participation in the permitting process. The commenter has concerns that the public was not provided access to the draft permit or statement of basis and that Kentucky was not required to provide a written response to comments received during the public comment period. For primacy approval under Section 1425, the state's regulations do not have to be as stringent as the federal regulations; therefore, Kentucky's public notice process does not need to mirror EPA's public notice process. Kentucky's public notice, which is included in the Program Description, provides the opportunity to request a copy of the draft permit and statement of basis. Commenters and those that attend a public hearing are notified if their comments do not result in a change to the final permit. An additional public notice is issued if comments do result in a change to the final permit. The public notice also provides an opportunity to petition the state for review of the permit and any conditions therein. Accordingly, the EPA has

determined that Kentucky's administrative permitting procedures are effective for protecting USDWs.

### *C. Area of Review*

One commenter is concerned that Kentucky does not have criteria for the applicant to use in determining whether the minimum ¼ mile fixed radius area of review around the project or an evaluation of a zone of endangering influence (ZEI) is required to ensure that USDWs are not endangered. The commenter is also concerned that it is the applicant, not the agency, that is required to make the determination on whether a ZEI is appropriate. With respect to the commenter's first concern, the state's regulations are not inconsistent with the federal regulations, which similarly lack criteria for determining whether to use fixed radius or ZEI for the area of review, providing only that the permit writer may solicit input from well owners/operators as to which method is most appropriate. 40 CFR 146.6. With respect to the commenter's concern about the applicant, not the agency, selecting the method, this is not entirely consistent with EPA's Class II regulations, which require this determination to be made by the agency. However, a state applying for primacy under SDWA section 1425 is required to demonstrate only that its regulations are "effective," not that they are equivalent to the federal regulations. EPA guidance on state submissions under SDWA section 1425 provides that an "effective" state program would be expected to incorporate an area of review of not less than ¼ mile, *or* a ZEI in lieu of this fixed radius. Kentucky has included both the fixed radius and ZEI methods as options, which goes beyond the recommendations provided in the guidance,



and is consistent with the two options provided in EPA's regulations. Moreover, under the state's proposed program, the applicant has the burden of proof to provide information to the state to ensure that the injection operation does not endanger a USDW. Kentucky has stated in its response to comments that it has statutory authority to require owners/operators of Class II wells to ensure that their operations do not endanger any USDWs, which could include the authority to require the applicant to calculate the area of review based on the ZEI method, if necessary to prevent endangerment to USDWs.

#### *D. Hydraulic Fracturing*

Commenters are concerned with how the state would regulate hydraulic fracturing activities. Under the SDWA, only wells that use diesel fuels for hydraulic fracturing are subject to regulation under the federal underground injection control program. Therefore, this Class II UIC primacy approval would give the state primacy only over this small subset of hydraulic fracturing wells. To the extent that there are any such wells, they would be subject to Kentucky's Class II program regulations, which EPA has found to be effective to prevent endangerment to USDWs. In addition, Kentucky has indicated in its application that it will consider, as appropriate, EPA's permitting guidance on diesel fuels hydraulic fracturing in regulating these wells. The state has regulatory authority over all other types of hydraulic fracturing.

## **VI. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is exempt from review by the Office of Management and Budget (OMB) because OMB has determined that the approval of state UIC primacy for Class II rules are not significant regulatory actions.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. EPA determined that there is no need for an Information Collection Request under the Paperwork Reduction Act because this final rule does not impose any new federal reporting or recordkeeping requirements. Reporting or recordkeeping requirements are based on the Commonwealth of Kentucky's UIC Regulations, and the state is not subject to the Paperwork Reduction Act. However, OMB has previously approved the information collection requirements contained in the existing UIC regulations at 40 CFR parts 144-148 for SDWA section 1422 states and also for section 1425 states under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and assigned OMB control number 2040-0042. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of

concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action does not impose any new requirements on any regulated entities. It simply codifies the Commonwealth of Kentucky's UIC Program regulations, which meets the effectiveness standard under SDWA section 1425 for regulating a Class II well program. I have therefore concluded that this action will have no net regulatory burden for any directly regulated small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate as described in UMRA, 2 U.S.C. 1521-1538. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

*E. Executive Order 13132 - Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175 as explained in section V.C. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health & Safety Risks*

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it approves a state action as explained in section V.C.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA believes the human health or environmental risk addressed by this action will *not* have potential disproportionately high and adverse human health or environmental

effects on minority, low-income or indigenous populations because the rule does not change the level of protection provided to human health or the environment.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 147**

Environmental protection, Appeals, Incorporation by reference, Penalties, Protection for USDWs, Requirements for plugging and abandonment, Underground injection control,.

Dated: December 20, 2016.

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Gina McCarthy,  
Administrator.

For the reasons set out in the preamble, title 40 of the Code of Federal Regulations is amended as follows:

**PART 147— STATE, TRIBAL, AND EPA-ADMINISTERED UNDERGROUND  
INJECTION CONTROL PROGRAMS**

1. The authority citation for Part 147 is revised to read as follows:

**Authority:** 42 U.S.C. 300h-4.

**Subpart S—Kentucky**

2. Section 147.900 is added to read as follows:

**§147.900 State-administered program—Class II wells.**

The UIC program for Class II injection wells in the Commonwealth of Kentucky, except for those on Indian lands, is the program administered by the Kentucky Department of Natural Resources, Division of Oil and Gas approved by the EPA pursuant to section 1425 of the SDWA. Notification of this approval was published in the Federal Register on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; the effective date of this program is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Table 1 to paragraph (a) of this section is the table of contents of the Kentucky state statutes and regulations incorporated as follows by reference. This program consists of the following elements, as submitted to the EPA in the state’s program application.

(a) *Incorporation by reference.* The requirements set forth in the Kentucky State statutes and regulations cited in the binder entitled “EPA-Approved Commonwealth of Kentucky Safe Drinking Water Act §1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II wells,” dated August 2016 is hereby

incorporated by reference and made a part of the applicable UIC program under the SDWA for the Commonwealth of Kentucky. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Kentucky regulations may be obtained or inspected at the Kentucky Department of Natural Resources, Division of Oil and Gas, 3<sup>th</sup> Floor, 300 Sower Blvd., Frankfort, Kentucky 40601, (315) 532-0191; at the U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960, (404) 562-8190; or at the National Archives and Records Administration (NARA). For information on availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Table 1 to paragraph (a) EPA-Approved Kentucky SDWA §1425 Underground Injection Control Program Statutes and Regulations for Class II Wells			
State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>
Kentucky Revised Statutes Chapter 13B	Kentucky Administrative Procedures Act KRS 13B.005 to 13B.170.	June 15, 1994	[Insert Federal Register citation]
Kentucky Revised Statutes 353.180	Requirements for plugging abandoned well—Bids—Remedy for possessor of adjacent land or for department.	June 24, 2015	[Insert Federal Register citation]
Kentucky Revised Statutes 353.510	Definition of KRS 353.500 to 353.720.	July 15, 2010	[Insert Federal Register citation]
Kentucky Revised Statutes 353.520	Territorial application of KRS 353.500 to	June 24, 2003	[Insert Federal Register citation]

Table 1 to paragraph (a) EPA-Approved Kentucky SDWA §1425 Underground Injection Control Program Statutes and Regulations for Class II Wells			
State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>
	353.720 –Waste of oil and gas prohibited.		
Kentucky Revised Statutes 353.550	Specific authority over oil and gas operators.	July 15, 1996	[Insert Federal Register citation]
Kentucky Revised Statutes 353.570	Permit Required—May authorize operation prior to issuance of permit.	July 15, 1998	[Insert Federal Register citation]
Kentucky Revised Statutes 353.590	Application for permit-Fees-Plat-Bond to insure plugging—Schedule –Blanket bonds-Corporate guarantee—Use of forfeited funds-Oil and gas well. plugging fund-Wells not included in “water supply well.”	July 15, 2010	[Insert Federal Register citation]
Kentucky Revised Statutes 353.591	Purpose and application of KRS 353.592 and 353.593.	July 15, 1986	[Insert FR citation]
Kentucky Revised Statutes 353.592	Powers of the department.	June 24, 2015	[Insert FR citation]
Kentucky Revised Statutes 353.593	Appeals.	July 15, 1996	[Insert FR citation]
Kentucky Revised Statutes 353.992	Penalties.	July 15, 1986	[Insert FR citation]
805 Kentucky Administrative Regulations 1:020	Providing Protection for USDWs.	August 9, 2007	[Insert FR citation]
805 Kentucky Administrative Regulations 1:030	Well location and as-drilled location plat, preparation, form and contents.	October 23, 2009	[Insert FR citation]
805 Kentucky Administrative Regulations 1:060	Plugging wells; non-coal-bearing strata.	June 11, 1975	[Insert FR citation]
805 Administrative Regulations 1:070	Plugging wells; coal bearing strata.	October 23, 1975	[Insert FR citation]
805 Kentucky	Underground Injection	April 4, 2008	[Insert FR citation]



Table 1 to paragraph (a) EPA-Approved Kentucky SDWA §1425 Underground Injection Control Program Statutes and Regulations for Class II Wells			
State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>
Administrative Regulations 1:110	Control.		

<sup>1</sup> In order to determine the EPA effective date for a specific provision listed in this table, consult the Federal Register document cited in this column for the particular provision.

(b) *Memorandum of Agreement (MOA)*. The MOA between EPA Region 4 and the Commonwealth of Kentucky Department of Natural Resources signed by EPA Regional Administrator on October 20, 2015.

(c) *Statements of Legal Authority*. “Underground Injection Control Program, Attorney General’s Statement,” signed by General Counsel of Kentucky Energy and Environmental Cabinet on June 7, 2010.

(d) *Program Description*. The Program Description submitted as part of Kentucky’s application, and any other materials submitted as part of this application or as a supplement thereto.

3. Section 147.901 is amended by revising the section heading and the first sentence of paragraph (a) to read as follows:

**§147.901 EPA-administered program—Class I, III, IV, V, and VI wells and Indian lands.**

(a) *Contents*. The UIC program for Class I, III, IV, V and VI wells and all wells on Indian lands in the Commonwealth of Kentucky is administered by the EPA. \* \* \*

\* \* \* \* \*

4. Section 147.902 is added to read as follows:

**§147.902 Aquifer exemptions.**

- (a) This section identifies any aquifers or their portions exempted in accordance with §§144.7(b) and 146.4 of this chapter. These aquifers are not being proposed for exemption under the Commonwealth of Kentucky's primacy approval. Rather, the exempted aquifers listed below were previously approved while EPA had primary enforcement authority for the Class II UIC program in the Commonwealth of Kentucky and are included here for reference. Additional information pertinent to these exempted aquifers or their portions resides in EPA Region 4.
- (1) The following eight aquifers (underground sources of drinking water) in the Commonwealth of Kentucky have been exempted in accordance with the provisions of §§144.7(b) and 146.4 of this chapter for Class II injection activities only: A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7261 and longitude -86.6914. The formation has a true vertical depth from surface of 280 feet.
- (2) A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7294 and longitude -86.7212. The formation has a true vertical depth from surface of 249 feet.
- (3) A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7055 and longitude -86.7177. The formation has a true vertical depth from surface of 210 feet.
- (4) A portion of the Pennsylvanian Age sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5402 and longitude -87.2551. The formation has a true vertical depth from surface of 1,050 feet.

- (5) A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7301 and longitude -87.6922. The formation has a true vertical depth from surface of 240 feet.
- (6) A portion of the Caseyville sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5776 and longitude -87.1321. The formation had a true vertical depth from surface of 350 feet.
- (7) A portion of the Caseyville sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5778 and longitude -87.1379. The formation has a true vertical depth from surface of 1,080 feet.
- (8) A portion of the Caseyville sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5652 and longitude -87.1222. The formation has a true vertical depth from surface of 1,060 feet.
- (b) [Reserved]

5. Section 147.903 is amended by revising the section heading to read as follows:.

**§ 147.903 Existing Class I and III wells authorized by rule.**

\* \* \* \* \*

**§ 147.904 [Removed and Reserved]**

6. Section 147.904 is removed and reserved.

[FR Doc. 2016-31268 Filed: 12/27/2016 8:45 am; Publication Date: 12/28/2016]